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Attorneys for Class Plaintiffs

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SUNIL SUDUNAGUNTA,
Individually and on behalf of all
others similarly situated,

Plaintiff,

v.

NANTKWEST, INC., PATRICK
SOON-SHIONG, RICHARD
GOMBERG, BARRY J. SIMON,
STEVE GORLIN, MICHAEL D.
BLASZYK, HENRY JI, RICHARD
KUSSEROW, JOHN T. POTTS, JR.,
ROBERT ROSEN, JOHN C.
THOMAS JR., MERRILL LYNCH,
PIERCE, FENNER & SMITH, INC.,
CITIGROUP GLOBAL MARKETS
INC., JEFFERIES LLC, PIPER
JAFFRAY & CO., and MLV & CO.,
LLC.,

Defendants.

Case No. 16-cv-01947-MWF
(JEMx)
Consolidated with
2:16-cv-3438-MWF-JFM

CLASS ACTION

**DECLARATION OF JOSHUA
B. SILVERMAN AND DAVID
J. STONE IN SUPPORT OF
MOTION FOR: (1) FINAL
APPROVAL OF CLASS
ACTION SETTLEMENT AND
PLAN OF ALLOCATION;
AND (2) AWARD OF
ATTORNEYS' FEES,
REIMBURSEMENT OF
EXPENSES, AND
PLAINTIFFS' AWARDS**

Date: April 29, 2019
Time: 10:00 a.m.
Before: Hon. Michael Fitzgerald
Courtroom: 5A

DECLARATION OF JOSHUA B. SILVERMAN AND DAVID J. STONE IN SUPORT OF MOTION FOR:
(1) FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION AND (2) AWARD OF
ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PLAINTIFFS' AWARDS
Case No. 16-cv-01947-MWF (JEMx)

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1 We, Joshua B. Silverman and David J. Stone, hereby declare as follows:

2 1. We are partners, respectively, at the law firms of Pomerantz LLP and
3 Bragar Eagel & Squire, P.C., Co-Lead Counsel in the above-captioned litigation
4 (the “Action”).

5 2. We submit this Joint Declaration in support of Class Plaintiffs’
6 (1) Motion for Final Approval of Class Action Settlement and Plan of Allocation
7 and (2) Motion for an Award of Attorneys’ Fees, Reimbursement of Litigation
8 Expenses, and Class Plaintiffs’ Awards. We have personal knowledge of the facts
9 asserted herein and could testify to those facts if called to do so.

10 **I. OVERVIEW**

11 3. The proposed Settlement¹ provides for a cash payment of \$12 million
12 for resolution of all claims in the Action against Defendants NantKwest, Inc.
13 (“NantKwest” or the “Company”), Patrick Soon-Shiong (“Soon-Shiong”), Richard
14 Gomberg, Barry J. Simon, Steve Gorlin, Michael D. Blaszyck, Henry Ji (“Ji”),
15 Richard Kusserow, John T. Potts, Jr., Robert Rosen, and John C. Thomas Jr.,
16 Merrill Lynch, Pierce, Fenner & Smith Inc., Citigroup Global Markets Inc.,
17 Jefferies LLC, Piper Jaffray & Co., and MLV & Co., LLC (collectively,
18 “Defendants”).

19 4. After assessing the merits of the case, as well as Defendants’ potential
20 defenses, the risks and expenses in continuing litigation through trial, and the
21 significant recovery achieved by the Settlement, Class Plaintiffs and Class Counsel
22 believe that the Settlement provides an extraordinarily favorable recovery and is in
23 the best interests of the Class.

24

25

26 ¹ Unless otherwise noted, all capitalized terms not defined herein shall have the same
27 meaning ascribed to them in the Stipulation of Settlement dated October 31, 2018
(the “Stipulation” or “Stip”) (ECF No. 173-1).

28

1 5. More specifically, this Settlement is the result of over two years of
2 hard-fought litigation, including, *inter alia*: (i) extensive investigation into the
3 claims alleged, both factual and legal; (ii) the drafting and filing of the Consolidated
4 Amended Class Action Complaint, two additional complaints with subsequently
5 discovered facts, and a fourth complaint in accordance with a Court order striking
6 certain claims; (iii) successfully opposing in part and in full two motions to dismiss;
7 (iv) extensive discovery, including written discovery, review and analysis of
8 documents produced by Defendants and third parties, and the taking or defending of
9 seven depositions; (v) consulting with retained experts regarding NantKwest's
10 accounting, damages, market efficiency, and the Company's representations
11 concerning Soon-Shiong's compensation; (vi) successfully obtaining class
12 certification; (vii) opposing Defendants' interlocutory appeal of the Court's order
13 granting class certification; (ix) preparing Class Plaintiffs' mediation statement and
14 analyzing Defendants' mediation statement; (x) attending a formal in-person
15 mediation session with JAMS mediator, Robert A. Meyer, Esq. (the "Mediator");
16 and, (xii) negotiating and preparing the Settlement Stipulation and related
17 Settlement documents.

18 6. The arm's-length negotiations, facilitated by the Mediator, took place
19 over several months between experienced counsel. As a result of the above-
20 described broad, comprehensive, and lengthy litigation practices, Class Plaintiffs
21 and Class Counsel were well-versed in the Action's facts and allegations, as well as
22 the strengths and weaknesses of the Action prior to mediation.

23 7. The Settlement Amount of \$12 million provides an immediate benefit
24 to the Class and is an excellent result relative to other securities class action
25 settlements. The Settlement Amount constitutes between approximately 10.5% and
26 30.5% of the most likely recoverable damages, if Class Plaintiffs prevail on all
27

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claims, depending on whether the Class is maintained as certified. After consulting with their experts, Class Plaintiffs estimate that if they prevailed on all of their claims based upon the Class as currently constituted, the maximum recovery would be \$114.6 million. Class Plaintiffs estimate that if Defendants prevailed on their petition for interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure, and the Class was restricted to exclude purchasers after August 7, 2016, the maximum recovery would be \$39.4 million. This recovery of estimated damages exceeds the annual median securities class action settlement for each year between 2007 and 2016 ranged between 1.8% and 2.8% of estimated damages² and 2018 median of 8% for actions involving Section 11 and/or Section 12(a)(2) claims under the Securities Act of 1933 (the “Securities Act”).³

8. As of April 2, 2019, the Court-appointed settlement administrator, JND Legal Administration (“JND” or the “Settlement Administrator”) has not received a single request for exclusion. Nor has any Class Member objected to any aspect of the Settlement, Plan of Allocation, Class Counsel’s anticipated fee request or request for expense reimbursement, or the anticipated compensatory awards to Class Plaintiffs.

9. Class Counsel, in consultation with an independent damages expert, developed the Plan of Allocation for the Net Settlement Fund, similar to allocation plans approved and successfully used in other securities class actions. Class Plaintiffs and Class Counsel believe the Plan of Allocation is fair, reasonable, and adequate and in the best interests of the Class.

² See <http://securities.stanford.edu/research-reports/1996-2016/Settlements-Through-12-2016-Review.pdf>.

³ See Laarni T. Bulan, et al., Cornerstone Research, *Securities Class Action Settlements: 2018 Review and Analysis*, at 7 (2019), available at <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2018-Review-and-Analysis>.

1 10. Class Counsel further request the Court to approve attorneys' fees in
 2 the amount of 25% of the Gross Settlement Fund, consistent with the Ninth Circuit
 3 benchmark. Class Counsel's request is consistent with the retainer agreements
 4 entered into with Class Plaintiffs and is supported by Class Plaintiffs. Not a single
 5 member of the Class has objected to notice that Class Counsel would request
 6 attorneys' fees in the amount provided in its motion. Moreover, a lodestar cross-
 7 check confirms the fairness and reasonableness of Class Counsel's request. Class
 8 Counsel spent 5,033.15 hours of professional time that has a market value of
 9 approximately \$3,123,720. The requested 25% award will result in a lodestar
 10 multiplier of 0.96, which is on the low end of the range of multipliers approved by
 11 courts in the Ninth Circuit. In addition, Class Counsel's request for reimbursement
 12 of litigation expenses totaling \$177,408.07 is reasonable and arises from expenses
 13 that are routinely incurred in this type of Action and reimbursed by the courts.

14 11. As indicated in the Notice, Class Plaintiffs also request the Court to
 15 award them \$7,500 each for the considerable time and effort that each provided to
 16 the Class.

17 **II. SUMMARY LIST OF EXHIBITS**

18 12. Annexed hereto as Exhibit 1 is a true and correct copy of the
 19 Declaration of Luiggy Segura Regarding: (A) Mailing of Notice of Pendency And
 20 Settlement of Class Action, and Proof of Claim And Release; (B) Publication
 21 Summary Notice of Class Action; and (C) Requests For Exclusions and Objections.

22 13. Annexed hereto as Exhibit 2 is a lodestar summary report of Co-Lead
 23 Counsel Pomerantz LLP.

24 14. Annexed hereto as Exhibit 3 is a lodestar summary report of Co-Lead
 25 Counsel Bragar Eagel & Squire, P.C.

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1 15. Annexed hereto as Exhibit 4 is a lodestar summary report of Liaison
2 Counsel Glancy Prongay & Murray, LLP.

3 16. Annexed hereto as Exhibit 5 is a litigation expense report of Co-Lead
4 Counsel Pomerantz LLP.

5 17. Annexed hereto as Exhibit 6 is a litigation expense report of Co-Lead
6 Counsel Bragar Eagel & Squire, P.C.

7 18. Annexed hereto as Exhibit 7 is a litigation expense report of Liaison
8 Counsel Glancy Prongay & Murray, LLP.

9 19. Annexed hereto as Exhibit 8 is the firm resume of Co-Lead Counsel
10 Pomerantz LLP.

11 20. Annexed hereto as Exhibit 9 is the firm resume of Co-Lead Counsel
12 Bragar Eagel & Squire, P.C.

13 21. Annexed hereto as Exhibit 10 is the firm resume of Liaison Counsel
14 Glancy Prongay & Murray, LLP.

15 22. Annexed hereto as Exhibit 11 is the declaration of Lead Plaintiff
16 Donald Hu in support of final approval of class action settlement, class certification
17 and the plan of allocation, and motion for an award of attorneys' fees and
18 reimbursement of litigation and plaintiffs' award.

19 23. Annexed hereto as Exhibit 12 is the declaration of Lead Plaintiff
20 Brayton Li in support of final approval of class action settlement, class certification
21 and the plan of allocation, and motion for an award of attorneys' fees and
22 reimbursement of litigation and plaintiffs' award.

23 **III. PROSECUTION OF THE ACTION**

24 **A. Summary of the Claims and Allegations**

25 24. This is a federal securities class action for violations of Sections 11 and
26 15 of the Securities Act against Defendants. NantKwest is a development-stage
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1 immunotherapy company. ¶ 2.⁴ At the end of 2014 and beginning of 2015,
 2 Defendant Soon-Shiong engineered a take-over of the Company, using an
 3 investment vehicle to buy a majority stake and another company controlled by him
 4 to purchase additional shares. ¶¶ 44-48. With this influence, by March 2015, Soon-
 5 Shiong caused NantKwest to appoint him as its Chief Executive Officer (“CEO”)
 6 and Chairman of the Board of Directors (the “Board”) and his business partner,
 7 Defendant Ji, a Director. ¶¶ 45, 47. At the time of his appointment as CEO, the
 8 Board issued Soon-Shiong warrants to purchase 17,589,250 shares of NantKwest
 9 common stock for \$2 per share (split-adjusted). ¶ 49. NantKwest and Soon-Shiong
 10 modified the warrant on May 8, 2015 to provide that 8,331,750 shares would vest
 11 upon an investment of at least \$20 million by a large pharmaceutical or biotech
 12 company in NantKwest at a minimum valuation of \$1.5 billion. ¶¶ 49-51.

13 25. At the time the warrant agreement was modified, Soon-Shiong and the
 14 other NantKwest Defendants knew that Celgene, a large biotech company, was
 15 likely if not certain to make such an investment. *Id.* Thus, under Generally
 16 Accepted Accounting Principles, NantKwest incurred and was required to record
 17 \$114,561,562 in executive compensation expense in the second quarter of 2015.
 18 ¶¶ 50-51. Soon-Shiong further enmeshed himself in NantKwest, lining his own
 19 pockets, by causing NantKwest to enter into numerous contracts with his other
 20 companies. ¶ 4.

21 26. The Company filed a registration statement for its initial public
 22 offering of stock (“IPO”) on June 19, 2015 and the final Registration Statement on
 23 July 16, 2015. ¶¶ 6-7. The FCAC alleges that the Registration Statement used to
 24

25
 26 ⁴ All paragraph references are to the Fourth Consolidated Amended Class Action
 27 Complaint (the “FCAC”) filed on August 24, 2018. ECF No. 162.

1 sell shares in the Company's IPO was materially false and misleading in failing to
2 disclose: (1) that on May 8, 2015, NantKwest had funneled more than \$100 million
3 in additional compensation to Soon-Shiong by modifying the warrant terms to
4 include a massive so-called "performance milestone" that was already virtually
5 certain to be achieved, and, therefore, NantKwest incurred a similar amount of
6 compensation expense at that time; (2) that effective May 2015, NantKwest had
7 engaged in a related-party facilities lease arrangement with NantWorks LLC, a
8 company owned by Soon-Shiong, pursuant to which NantKwest had incurred
9 millions of dollars of liability prior to the time of the IPO; and (3) the material
10 weaknesses in the Company's internal controls. ¶ 8. By omitting this material
11 information, on July 28, 2015, Defendants were able to successfully raise over \$225
12 million in net proceeds in the IPO. ¶ 7.

13 **B. Commencement of the Action and Appointment of Lead Plaintiffs**

14 27. This litigation commenced on March 22, 2016 when a securities class
15 action complaint styled as *Sundunagunta v. NantKwest, Inc.*, No. 16-cv-01947-
16 MWF-JEM was filed on behalf of all persons or entities who purchased or
17 otherwise acquired publicly traded securities of NantKwest, alleging violations of
18 Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange
19 Act"). ECF No. 1. On June 3, 2016, the Court consolidated the *Sundunagunta*
20 action with *Forsythe v. NantKwest, Inc.*, No. 16-cv-03448-MWF-JEM, filed on
21 May 18, 2016. ECF No. 33.

22 28. On June 14, 2016, the Court appointed Plaintiffs Donald Hu and
23 Brayton Li as Lead Plaintiffs, Pomerantz LLP and Bragar Eagel & Squire, P.C. as
24 Co-Lead Counsel, and Glancy, Prongay & Murray LLP as Liaison Counsel. ECF
25 No. 34.

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1 29. On October 11, 2016, the Court consolidated into this Action four
2 additional actions that had been filed in California state court and subsequently
3 removed to the United States Court for the Central District of California (the
4 “Removed Actions”): (1) *Wagner v. NantKwest, Inc.*, No. 16-cv-06703-MWF-
5 JEM; (2) *Hare v. NantKwest, Inc.*, No. 16-cv-06697-MWF-JEM; (3) *Wienczek v.*
6 *NantKwest, Inc.*, No. 16-cv-06705-MWF-JEM; and, (4) *Frye v. NantKwest, Inc.*,
7 16-cv -06700-MWF-JEM. ECF No. 76. On October 7, 2016, plaintiffs in the
8 Removed Actions requested relief from this Court’s Order appointing lead plaintiff,
9 which the Court denied on February 6, 2017. ECF No. 93.

10 **C. Class Plaintiffs’ Filing of Amended Complaints and Briefing on**
11 **Defendants’ Motions to Dismiss**

12 30. Class Plaintiffs filed a Consolidated Amended Class Action Complaint
13 For Violations of the Federal Securities Laws (the “CAC”) on August 4, 2016. ECF
14 No. 49. The CAC alleged violations of Sections 11 and 15 of the Securities Act and
15 Sections 10(b) and 20(a) of the Exchange Act. The CAC was based on extensive
16 investigation and analysis of Class Counsel which included, *inter alia*, a review of
17 Defendants’ public documents, filings with the U.S. Securities and Exchange
18 Commission (“SEC”), wire and press releases published by, and regarding,
19 NantKwest, and analysts’ reports and advisories about the Company.

20 31. Defendants moved to dismiss the CAC on October 6, 2016 (ECF No.
21 70), which Class Plaintiffs opposed (ECF No. 86). On May 16, 2017, the Court
22 issued an Order granting in part and denying in part Defendants’ October 6, 2016
23 motion to dismiss the CAC. ECF No. 108.

24 32. Class Plaintiffs filed the Second Consolidated Amended Class Action
25 Complaint (the “SCAC”) on June 5, 2017. ECF No. 109. Pursuant to discussions
26 and possible provision of additional information concerning certain of the
27

1 allegations in the SCAC, the parties stipulated to and the Court ordered the filing of
2 the Third Consolidated Amended Class Action Complaint (the “TCAC”). ECF
3 Nos. 110, 111.

4 33. The TCAC was filed on July 10, 2017. ECF No. 112. On July 31,
5 2017, Defendants moved to dismiss the TCAC (ECF No. 113), which Class
6 Plaintiffs opposed (ECF No. 116). The Court denied Defendants’ motion to dismiss
7 in its entirety on September 20, 2017. ECF No. 121.

8 **D. Fact and Expert Discovery**

9 34. After the Court’s order denying Defendants’ motion to dismiss the
10 TCAC, the parties engaged in extensive fact discovery, which included: issuance of
11 interrogatories and requests for production to Defendants and third-parties;
12 responses to interrogatories and requests of production from Defendants; production
13 of documents; and depositions.

14 35. Defendants and third-parties produced over 140,000 pages of
15 documents in response to Class Plaintiffs’ requests for production. These
16 documents were reviewed by Class Counsel prior to the Settlement.

17 36. Class Counsel deposed: (i) NantKwest General Counsel Charles Kim,
18 who played a major role in the Celgene negotiations; (ii) John Thomas, Jr., a
19 NantKwest Board member and Audit Committee chairman; (iii) Sean Clayton of
20 Cooley LLP, who led much of the due diligence that the Underwriter Defendants
21 conducted for the NantKwest IPO; and (iv) two senior members of the audit team
22 from NantKwest’s auditor, Mayer Hoffman McCann, P.C., Jacqueline Dale and
23 Steve Fanuchi. Defendants deposed both Class Plaintiffs.

24 **E. Class Certification**

25 37. On April 2, 2018, Class Plaintiffs moved to strike from the TCAC the
26 claims brought under the Exchange Act and moved for class certification with
27

1 respect to the remaining claims brought under the Securities Act. ECF Nos. 140-
2 144. Defendants opposed Class Plaintiffs' motion to strike on April 9, 2018 (ECF
3 No. 146) and motion for class certification on May 30, 2018 (ECF Nos. 152-153).

4 38. On August 13, 2018, the Court entered an Order permitting Class
5 Plaintiffs to withdraw claims brought under the Exchange Act but directing them to
6 do so by filing a fourth amended complaint, granting certification of the Class, and
7 appointing Lead Plaintiffs to serve as Class Plaintiffs and their counsel of record to
8 serve as Class Counsel. ECF No. 160.

9 39. Class Plaintiffs filed the FCAC on August 24, 2018. In response, on
10 August 27, 2018, Defendants filed a petition for permission to appeal the Court's
11 August 13, 2018 Order granting class certification, and the Underwriter Defendants
12 (*see* ¶¶ 29-35) joined in that petition. Class Plaintiffs filed an Opposition to
13 Defendants' petition on September 6, 2018.

14 **F. Settlement Negotiations and Mediation**

15 40. The parties reached the proposed Settlement through a protracted, good
16 faith, arm's-length negotiation facilitated by the Mediator, an experienced mediator
17 specializing in complex litigation. Prior to the mediation session, the parties
18 exchanged mediation statements detailing the strengths and weaknesses of their
19 case and damages analyses.

20 41. Counsel for all parties and the insurer participated in an in-person
21 mediation session on March 14, 2018, but did not reach a resolution. The parties
22 continued negotiations for several months with the assistance of the Mediator,
23 through additional telephonic and written discussions.

24 42. On September 7, 2018, the Mediator made a mediator's proposal to all
25 parties recommending the settlement of this Action for the Settlement Amount of
26 \$12 million. The parties accepted the mediator's proposal on September 14, 2018
27

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1 and executed a binding Memorandum of Understanding on September 25, 2018.
2 Finalization of the Settlement terms embodied in the Stipulation followed, with the
3 Stipulation being executed on October 31, 2018.

4 **IV. THE SETTLEMENT**

5 43. Under the terms of the Settlement, NantKwest's insurers paid \$12
6 million into an escrow account maintained by Class Counsel within 20 business
7 days of preliminary settlement approval (the "Settlement Fund") on behalf of all
8 Defendants. Stip. at ¶ II.A.

9 44. The Settlement Fund, including any interest earned thereon, shall be
10 used first to pay the following: (1) taxes and tax expenses; (2) notice and
11 Administration Expenses; (3) attorneys' fees and expenses as approved by the
12 Court; and (4) compensatory awards to the Class Plaintiffs as approved by the
13 Court. Stip. at ¶ III.A. The remaining balance, the Net Settlement Fund, shall be
14 paid to Authorized Claimants on a *pro rata* basis as set forth in the Notice and
15 proposed Plan of Allocation.

16 45. In exchange for the consideration above, upon the Effective Date,
17 Class Plaintiffs and Class Members who do not timely and validly exclude
18 themselves shall be deemed to have, and by operation of the Judgment shall have,
19 fully, finally, and forever, released, relinquished, settled, and discharged the
20 Released Parties from the Released Claims and shall be permanently barred and
21 enjoined from instituting, commencing, or prosecuting any of the Released Claims
22 against any of the Released Parties directly, indirectly, or otherwise, whether or not
23 such Class Plaintiffs or Class Members execute and deliver a Proof of Claim and
24 Release to the Settlement Administrator. Stip. at ¶ VIII-B. Upon the Effective
25 Date, Defendants shall also release and shall be permanently barred and enjoined
26 from instituting, commencing, or prosecuting any claim against Class Plaintiffs,
27

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1 Class Members, or Class Counsel related to this Action or the prosecution thereof.
2 *Id.*

3 **A. The Court Has Preliminarily Approved Settlement**

4 46. On September 24, 2018, the parties notified the Court that they had
5 reached a settlement in principle. ECF No. 169. On November 9, 2018, Class
6 Plaintiffs filed their Motion for Preliminary Approval of Class Action Settlement
7 and Notice to the Settlement Class, along with the Stipulation and related
8 documents. ECF Nos. 171-173.

9 47. On January 9, 2019, the Court issued an Order granting preliminary
10 approval of the proposed Settlement and directing dissemination of notice to Class
11 Members (the “Preliminary Approval Order”). ECF No. 177.

12 **B. Dissemination of Notice to the Class Was Adequate**

13 48. Pursuant to the Preliminary Approval Order, on January 29, 2019, JND
14 mailed 4,332 copies of the Notice and Proof of Claim and Release Form (the
15 “Notice Packet”) to potential Class Members and their brokers and nominees. *See*
16 Declaration of Luiggy Segura (the “Segura Decl.”) ¶ 7 (Exhibit 1 hereto).

17 49. The names and addresses of Class Members were obtained from
18 listings provided to JND by American Stock Transfer, the transfer agent for
19 NantKwest; research of SEC filings on Form 13-F; and, JND’s proprietary database
20 of names of the most common banks, brokerage firms, nominees, and known third-
21 party filers. *Id.* at ¶¶ 4-6.

22 50. Additional Notice Packets were mailed after JND received notice of
23 potential Class Members from nominees, brokers, and telephone and/or email
24 requests. *Id.* at ¶¶ 8-11. In total, through April 2, 2019, JND has mailed a total of
25 25,375 Notice Packets to potential Class Members, brokers, and nominee holders.
26 *Id.* at ¶ 11.

1 51. The Notice provided, *inter alia*, the following information to Class
2 Members: (1) the reasons for and material terms of the Settlement; (2) that Class
3 Members may appear through their own counsel if desired, including at the
4 Settlement Hearing; (3) the deadlines and procedures for requesting an exclusion or
5 objecting to the Settlement; (4) a statement of recovery; (5) the date, time, and place
6 of the Settlement Hearing; (6) information about the proposed attorneys' fees and
7 costs, and proposed compensatory awards to Class Plaintiffs; and (7) the identity
8 and contact information of the representatives of Class Counsel and procedures for
9 making inquiries. Segura Decl., Ex. A. The Notice also included the proposed Plan
10 of Allocation and information on how to submit a Proof of Claim. *Id.*

11 52. JND also arranged for Summary Notice to be published in *PrNewswire*
12 on February 8, 2019 and February 15, 2019. *Id.* at ¶ 12.

13 53. In addition, beginning on or about January 29, 2019, JND established
14 and continues to maintain a toll-free telephone number with a live operator during
15 regular business hours dedicated to fielding calls and questions from NantKwest
16 shareholders. *Id.* at ¶ 13. JND, in coordination with Class Counsel, has also
17 designed, implemented, and currently maintains a website,
18 www.NantKwestSecuritiesLitigation.com, operational as of January 28, 2019,
19 providing, among other things, pertinent deadlines of the settlement proceeding
20 (*i.e.*, deadlines to request exclusion, object, and submit claims, and the Settlement
21 Hearing date) as well as all pertinent settlement documents (*i.e.*, the Preliminary
22 Approval Order, Notice Packet, and Summary Notice). *Id.* at ¶ 14.

23 54. As of April 2, 2019, JND has not received a single request for
24 exclusion. The deadline to submit a request for exclusion is April 15, 2019. *Id.* at
25 ¶ 16.

1 55. The Notice informs potential Class Members that objections from
2 Class Members are to be addressed to each counsel of record. *Id.* at ¶ 17.

3 56. Through April 2, 2019, neither Class Counsel nor JND has received a
4 single objection to the Settlement, any part thereof, Class Counsel's proposed
5 attorneys' fees and expenses, or the proposed compensatory awards to Class
6 Plaintiffs. *Id.* at ¶ 18. The deadline to file objections is also April 15, 2019. *Id.*

7 57. JND will submit a supplemental declaration addressing any exclusion
8 requests or objections received once the April 15, 2019 deadline has passed. *Id.* at
9 ¶ 19.

10 **C. The Settlement is Fair, Reasonable, and Adequate and in the Best**
11 **Interests of the Class**

12 58. In light of the considerations discussed in Class Plaintiffs' Motion for
13 Final Approval of Settlement and accompanying Memorandum of Points and
14 Authorities, Class Plaintiffs and Class Counsel, experienced nationally-recognized
15 securities class action law firms, submit that the Settlement is fair, reasonable, and
16 adequate, satisfies the standards of Rule 23, and provides a significant recovery for
17 the Class. *See* Exs. 8-10.

18 59. The arm's-length Settlement negotiations, between experienced
19 counsel, took place with the help of an experienced mediator after extensive
20 vigorous litigation and substantial discovery. Settling Defendants are also
21 represented by prominent, experienced law firms. There are no other indicia of
22 collusion here such as "disproportionate distribution of the settlement," a clear-
23 sailing fee agreement, or an agreement permitting unpaid fees to revert to
24 Defendants.

25 60. The immediate benefits of the proposed Settlement outweigh the
26 substantial risks, delay, and expense of continued litigation. Although, based on the
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1 extensive investigation, record, and substantial discovery, Class Plaintiffs and Class
2 Counsel believe all the asserted claims have merit, there are also uncertainties and
3 risks in continuing the litigation. If litigation proceeded, Class Plaintiffs would
4 have to prevail on the interlocutory appeal pursuant to Federal Rule of Civil
5 Procedure 23(f) now pending before the United States Court of Appeals for the
6 Ninth Circuit, or face a considerably smaller class with much lower aggregate
7 damages.

8 61. Defendants would be expected to mount a vigorous defense at trial and
9 further litigation would be expensive, complex, and protracted. Class Plaintiffs
10 would have to prove that the alleged false and misleading statements and omissions
11 were material, and that Defendants failed to make a reasonable investigation or
12 possess a reasonable basis for the belief that the statements contained in the
13 Registration Statement were true and would have to prove that they violated their
14 duties to make such a reasonable investigation.

15 62. Damages would also be disputed, with Defendants most likely arguing
16 negative causation, a statutory defense to claims asserted under Section 11 of the
17 Securities Act, possibly limiting recovery to the Class, creating a costly and time-
18 consuming “battle of the experts.” Class Plaintiffs and Class Counsel would be
19 required to expend significant time and expense in preparing the case for trial in
20 light of these issues, including possible summary judgment motion practice. And,
21 even if the Class survived summary judgment and prevailed at trial, Defendants
22 could appeal, further delaying and potentially undermining any recovery. While
23 Class Plaintiffs and Class Counsel believe they would ultimately prevail, they
24 acknowledge the possibility that they might not, resulting in no recovery at all for
25 the Class.

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63. The Settlement amount of \$12 million constitutes between approximately 10.5% and 30.5% of the most likely recoverable damages, if Class Plaintiffs prevail on all claims, depending on whether the Class is maintained as certified, or shortened. After consulting with their experts, Class Plaintiffs estimate that if they prevailed on all of their claims based upon the class as currently constituted, the maximum recovery would be \$114.6 million. Class Plaintiffs estimate that if Defendants prevailed on their petition for interlocutory appeal under Rule 23(f), and the class was restricted to exclude purchasers after August 7, 2016, the maximum recovery would be \$39.4 million. The Class's recovery would be materially less if Defendants prevailed on their negative causation defenses. Even the lower recovery estimate of 10.5% exceeds the median settlement of 8.0% of statutory damages for Section 11 and/or 12(a)(2) only cases for 2018. *See, e.g.,* Laarni T. Bulan, et al., Cornerstone Research, *Securities Class Action Settlements: 2018 Review and Analysis*, at 7 (2019), <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2018-Review-and-Analysis>.

64. Lastly the Settlement treats Class Members equitably. All Class Members, including Class Plaintiffs, will receive *pro rata* recoveries based on the same recognized loss calculation formula.

D. The Plan of Allocation is Fair, Reasonable, and Adequate

65. As stated in the Notice provided to potential Class Members, Class Members who wish to participate in the Settlement must submit a Proof of Claim and Release Form by April 26, 2019. Segura Decl., Ex. A. The Notice explains that the Net Settlement Fund, including any interest earned thereon, after deduction of: (1) taxes and tax expenses; (2) notice and Administration Expenses; (3) attorneys' fees and expenses as approved by the Court; and (4) compensatory

1 awards to the Class Plaintiffs as approved by the Court, shall be paid to Authorized
2 Claimants on a *pro rata* basis according to the Court-approved plan of allocation
3 (the “Plan of Allocation”).

4 66. Class Plaintiffs and Class Counsel believe that the proposed Plan of
5 Allocation will result in a fair and equitable distribution of the Settlement proceeds
6 among Class Members who suffered losses as a result of the conduct alleged in the
7 Action similar to any result if Class Plaintiffs were successful at trial. Class
8 Counsel developed the Plan of Allocation in consultation with an independent
9 expert with the goal of distributing net settlement funds to eligible Class Members
10 in a fair and reasonable manner.

11 67. Specifically, the Plan of Allocation calculates a “Recognized Loss”
12 amount for each Class Member which depends on several factors, including when
13 the stock was sold and the purchase and sale prices. The Net Settlement Fund will
14 be allocated to eligible claimants on a *pro rata* basis based on the relative size of
15 their Recognized Claims.

16 **V. THE FEE AND LITIGATION EXPENSE APPLICATION**

17 **A. The Fee Application**

18 68. As compensation for their efforts, Class Counsel are applying for an
19 award of attorneys’ fees in the amount of 25% of the Settlement Fund, or
20 \$3,000,000, and reimbursement of \$177,408.07 in expenses reasonably incurred in
21 the prosecution and settlement of the Action. *See* Motion and Memorandum of Law
22 in Support of Attorneys’ Fees, Reimbursement of Expenses and Class Plaintiffs’
23 Awards (the “Fee Brief”) filed herewith. Class Plaintiffs and Class Counsel have
24 prosecuted this case for over two years without any compensation whatsoever, and
25 incurred close to two hundred thousands of dollars in expenses without any
26 guarantee of success.

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69. The 25% fee request is the benchmark awarded by courts in the Ninth Circuit, as further detailed and discussed in the Fee Brief.

B. The Fee Application

70. Class Plaintiffs, through the vigorous efforts of Class Counsel, engaged in extensive factual investigation and litigation of the claims alleged in the FCAC. By the time the Settlement was reached, Class Counsel had:

- Drafted an initial complaint and four Amended Complaints;
- Briefed and successfully prevailed on two motions to dismiss;
- Briefed and successfully prevailed on a motion for class certification;
- Defended the depositions of Class Plaintiffs;
- Deposed NantKwest's General Counsel and the Chairman of its Audit Committee;
- Deposed two accountants associated with NantKwest's outside auditor;
- Met and consulted with experts in preparation for drafting the amended complaints;
- Briefed an opposition to Defendants' request for an interlocutory appeal to the Ninth Circuit regarding the Court's decision to certify the Class;
- Prepared and served comprehensive document requests upon Defendants;
- Served subpoenas on additional third-parties;
- Obtained and reviewed over 140,000 pages of documents from Defendants and third parties in the Action;
- Engaged in meet-and-confer discussions and correspondence with Defendants regarding the Parties' responses to discovery requests, and the scope of their document productions;
- Responded to Defendants' discovery requests directed to Class Plaintiffs;
- Consulted with economic experts in the areas of accounting, loss causation, market efficiency, and damages;
- Prepared for and participated in a full-day mediation with a nationally regarded third-party neutral, including drafting a mediation statement;
- Participated in continued negotiation efforts over the months following the

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- 1 mediation to achieve and finalize the Settlement and document it in the
2 Stipulation;
- 3 • Obtained a \$12 million settlement following arm's-length negotiations with
4 Defendants;
 - 5 • Consulted with experts regarding the Plan of Allocation and support for
6 preliminary approval of the Settlement; and
 - 7 • Prepared the documents required for preliminary and final approval of the
8 Settlement.

9 71. The expertise and experience of Class Counsel is also an important
10 factor to be weighed in assessing a fair fee. As demonstrated in the firm
11 biographies (Exs. 8-10), Class Counsel are comprised of experienced and skilled
12 practitioners in the securities litigation field. Class Counsel achieved significant
13 securities class action settlements, as well as being counsel of record in cases
14 establishing important precedents that enable litigation such as this to be
15 successfully prosecuted.

16 72. Class Counsel prosecuted the Action vigorously, expending substantial
17 time and resources without any assurance of obtaining any compensation for their
18 efforts. Class Counsel have already devoted a significant amount of time to this
19 case, and fully expect to devote more time in connection with the future
20 administration and distribution of the Settlement.

21 **C. Standing and Caliber of Opposing Counsel**

22 73. The quality of the work performed by Class Counsel in attaining the
23 Settlement should also be evaluated in light of the quality of the opposition.
24 Defendants were represented by prominent attorneys from the law firm of Wilson,
25 Sonsini, Goodrich & Rosati PC and Munger Tolles & Olson LLP. In the face of
26 this knowledgeable and formidable opposition, Class Counsel was nevertheless able
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1 to develop a case that was sufficiently strong to persuade Defendants to settle it on
2 terms that are favorable to the Class.

3 **D. The Risks of Contingent Litigation**

4 74. Class Counsel undertook representation of Class Plaintiffs and the
5 Class on a wholly contingent basis. Class Counsel knew from the outset that they
6 would expend a substantial amount of time prosecuting this Action yet receive no
7 compensation if the Action proved ultimately unsuccessful. Thus, the contingent
8 nature of payment of fees and expenses and the risks and complexity of the Action
9 should be given substantial weight by the Court in considering the instant
10 application for fees and expenses.

11 75. As described above, this Action involved serious legal and practical
12 hurdles that could have resulted in no recovery at all. Continued litigation would
13 have entailed significant risks to the Class, as the Action could be derailed in any
14 number of ways before a final judgment in Class Plaintiffs' favor was entered (and
15 withstood possible appeal).

16 76. As a result of consistent and persistent efforts in the face of substantial
17 risks and uncertainties, Class Counsel achieved a significant recovery for the benefit
18 of the Class.

19 **E. The Reaction of the Class to the Requested Fee**

20 77. 25,375 copies of the Notice have been mailed to potential Class
21 Members. Segura Decl. at ¶ 11. The Notice advised Class Members that Class
22 Counsel would apply for an award of attorneys' fees from the Settlement Fund,
23 cumulatively not to exceed 25% of the Fund.

24 78. As of the time of this filing, there have been no objections to the
25 proposed fee application. Additionally, as of the time of this filing, no requests for
26 exclusion have been received in relation to the Notice of Pendency and Notice of
27

1 Settlement mailing, and no requests for exclusion have been received from the
2 Settlement. *Id.* at ¶¶16-18.

3 **F. The Fee Request is Also Justified Under the Lodestar/Multiplier**
4 **Approach**

5 79. The Ninth Circuit has found that a court may also consider a
6 lodestar/multiplier approach in assessing the reasonableness of a fee request. The
7 lodestar is determined by multiplying the number of reasonable hours worked on a
8 client's case by a reasonable hourly billing rate for such services given the
9 geographical location, the nature of the services provided, and the experience of the
10 lawyer. It can then be increased (or in some cases decreased) based upon the
11 contingent nature or risk in the particular case involved, and the quality of the
12 attorney's work. A percentage increase or decrease of the lodestar amount is
13 referred to as a "multiplier."

14 80. Altogether, Class Counsel dedicated 5,033.15 hours to prosecuting this
15 Action. These hours were compiled from contemporaneous time records
16 maintained by each attorney and paralegal. Applying Class Counsel's normal
17 hourly rates, which are consistent with those charged by similarly skilled firms in
18 their respective geographic areas, to the hours expended in this Action yields a
19 lodestar amount of \$3,123,720. Their total expenses were \$177,408.07. These
20 substantial hours and expenses reflect Class Counsel's commitment to the
21 aggressive prosecution of this Action.

22 81. The fee requested represents a multiplier of approximately 0.96. As set
23 forth in the Fee Brief, in contingent litigation, lodestar multipliers between 1.0 and
24 4.0 have been routinely awarded by courts in the Ninth Circuit and in other federal
25 jurisdictions, and suggest that the requested fee award is a reasonable and fair
26 valuation of the services rendered to the Class by Class Counsel especially in light
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1 of the fact that the multiplier here is significantly below what the courts have
2 previously awarded in this Circuit. As reflected in the Notice, Lead Counsel have
3 agreed to apply for fees cumulatively not to exceed 25% of the \$12 million
4 Settlement Fund.

5 **G. Request For Reimbursement of Expenses**

6 82. Class Counsel also request reimbursement of \$177,408.07 in expenses,
7 which is less than the estimate of expenses contained in the Notice. The expenses
8 requested are reflected in the records of Class Counsel, prepared in the normal
9 course of business and are an accurate record of the expenses incurred. The
10 expenses noted are reasonable and were incurred for items necessary to the
11 prosecution of the Action. The expenses were incurred largely in conjunction with
12 experts, mediation, necessary travel, private investigation, computer-based legal
13 research, and depositions. These expenses were all incurred for the benefit of the
14 Class, and, as explained in the Fee Brief submitted herewith, are of the type
15 generally billed to, and reimbursed by, individual clients in standard billing
16 arrangements.

17 **VI. REIMBURSEMENT OF COSTS AND EXPENSES OF CLASS**
18 **PLAINTIFFS**

19 83. Each of the two Class Plaintiffs seek reimbursement, pursuant to the
20 PSLRA, 15 U.S.C. § 78u-4(a)(4), of reasonable expenses incurred in connection
21 with the Action in the amount of \$7,500. The amount of time and effort devoted to
22 this Action by Class Plaintiffs, who reviewed the amended complaints and
23 numerous other pleadings in this Action, regularly communicated with Class
24 Counsel to stay apprised of developments in the case, sat for depositions in support
25 of the successful motion for class certification, produced documents in response to
26 Defendants' discovery requests, responded to interrogatories, and participated in
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1 settlement discussions with Class Counsel, is detailed in the accompanying Class
2 Plaintiffs' declarations. *See* Exs. 9 and 10.


3 84. A moderate upward departure from the "typical" \$5,000 per
4 representative award is justified because the financial value of the time that each
5 Class Plaintiff devoted to this case exceeds the requested amount of \$7,500, and the
6 Class Plaintiffs conferred substantial benefit upon the Class due to their significant
7 efforts as identified in ¶ 82. *See also* Exs. 9 and 10.

8 **VII. CONCLUSION**

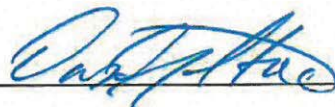
9 85. In view of the significant recovery to the Settlement Class, the
10 substantial risks of this Litigation, the substantial efforts of Class Counsel, the
11 quality of the work performed, the contingent nature of the fee, and the standing and
12 experience of Class Counsel, Class Counsel respectfully submits that: the
13 Settlement should be approved as fair, reasonable, and adequate; the Plan of
14 Allocation should be approved as fair and reasonable; a fee in the amount of 25% of
15 the \$12 million Settlement Fund, plus any accrued interest, should be awarded to
16 Class Counsel; litigation expenses in the amount of \$177,408.07 plus any accrued
17 interest, should be reimbursed in full; and Class Plaintiffs should be awarded \$7,500
18 each.

19 I declare under penalty of perjury that the foregoing is true and correct.

20 Executed: April 8, 2019
Chicago, Illinois

21 
22 _____
Joshua B. Silverman

23 Executed: April 8, 2019
24 New York, New York

25 
26 _____
David J. Stone

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PROOF OF SERVICE BY ELECTRONIC POSTING

I, the undersigned say:

I am not a party to the above case, and am over eighteen years old. On April 8, 2019, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the Central District of California, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this April 8, 2019, at Los Angeles, California.

s/Kara M. Wolke

Kara M. Wolke

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